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Supreme Court, U.S.
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(1)

IN THE
SUPREME COURT OF THE UNITED STATES

ANANT KUMAR TRIPATI,

Petitioner,

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, GUNN McKAY; DEAN CHATFIELD; DONALD CONRAD; MARICOPA COUNTY ATTORNEY; COUNTY OF MARICOPA; TERRY BLAKE; RONALD HARRIS; DICK MESH; GERALD GRANT; RICHARD M. ROMLEY; TERESA ARCHULETA; VINCENT H. TOLINO; ESTATE OF TERESA ARCHULETA; ED KING; BETSEY BAYLESS; TOM RAWLES; DON STAPLEY; MARY ROSE WILCOX; DORA SCHRIRO, ADOC DIRECTOR; TERRY GODDARD ATTORNEY GENERAL ARIZONA; MICHAEL MUKASEY, ATTONEY GENERAL UNITED STATES

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANANT KUMAR TRIPATI
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PETITIONER PRO PER

QUESTION PRESENTED

1. This court has since *McNabb v United States,* 318 U.S. 332 (1943) exercised it's Supervisory Powers over Federal Courts when the Federal Courts have failed to apply proper standards. When Federal Courts fail to review the record on appeal and bar submission of petitions for rehearing or suggestion for rehearing or suggestion for hearing EN BANC, does McNabb require this Court to exercise its Supervisory Powers?

a. Can a Federal Judge request a Rule 50 motion be made and grant that motion during the final pre trial conference?

b. Does *Heck v Humphrey,* 512 U.S. 477 (1994) bar claims regarding property not listed in the return to a search warrant which property respondent's deny seizing?

c. Are 801(D)(2) statements admissible as substantive evidence? Must other evidence corroborate 801(D)(2) admissions?

d. Does *St.Paul Mercury Indem Co. v Red Cab Co.*, 303 U.S. 283, 295-296 (1938) in a diversity action allow a federal Court to disregard the uncontroverted affidavit as to the value of the property submitted by the petitioner and consider the argument of the Counsel in finding the amount in controversy was not satisfied?

2. *Carey v Musladin*, 127 S.Ct. 649, 653 (2006) authorizes habeas relief when the issues do not implicate an "open question" in this Court's jurisprudence. Does the Rule in *Carey* authorize habeas relief when a habeas petitioner demonstrates a violation of principles as established in *Brady v Maryland*, 373 U.S. 83(1963); *Pyle v Kansas*, 317 U.S. 213(1942); *Napue v Illinois*, 360 U.S. 264 (1959); *Alcorta v Texas*, 355 U.S. 28 (1957) and *Vasquez v Hillery*, 474 U.S. 254 (1986)?

a. Does *Miller-EL v Cockrell*, 537 U.S. 322 (2003) allow the Circuit Court to deny the request for a Certificate of Appealability to an incontestably actually innocent prisoner without reviewing the application for a certificate?

b. Can the Circuit deny due process by directing the denial shall not be reexamined by way of rehearing or suggestion for hearing EN BANC?

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PARTIES TO PROCEEDING

"ALL PARTIES APPEAR IN THE CAPTION"

OPINIONS BELOW

The Ninth Circuit's decision not to recall the mandate filed on March 9th, 2007 is set forth at Appendix pp 1. The mandate was issued on January 11th, 2007. Pertinent orders of the Ninth Circuit are set forth at Appendix pp. 3 and pp. 4. The District Court's pertinent orders are set forth at Appendix pp. 9 through Appendix pp. 146. On June 12, 2007 the Ninth Circuit denied Mandamus relief. [Appendix pp. 617]

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals issued its orders refusing to recall the mandate on March 9th, 2007. [Appendix pp. 1-2] On June 12, 2007 the Ninth Circuit denied mandamus relief [Appendix pp. 624-625]. This Court has jurisdiction pursuant to 28 U.S.C. 1254 (1).

As the petitioner does demonstrate judicial usurpation of power by the Ninth Circuit, this exceptional circumstance warrants Mandamus relief. Petitioner does not have any adequate relief in any other form or forum. 28 U.S.C. 1651 (a) and 1251 confer jurisdiction. By this letters dated June 7, 2007 [Appendix pp. 641], August 14, 2007 [Appendix pp. 643], and then finally on October 16, 2007 [Appendix pp. 645] the Court granted petitioner until December 15, 2007 to file this petition.

I.
STATEMENT OF THE CASE

Several "Persons of Interest" at the Attorney General's Office are being protected and want NO HEARING and NO DISCOVERY in this matter;

Documentation shows a cover-up by groups/members of Maricopa County Judges with the assistance and support of the Arizona Attorney General's Office; [Appendix pp. 637]

Maricopa County Judges Reinstein, Schwartz, and Martin, requested evidence be destroyed. Additionally, the Attorney General's Office had the State of Arizona Prosecutors and Judges create and destroy evidence to obtain an unlawful conviction of the petitioner, while threatening and intimidating witnesses to testify falsely or face criminal prosecution. These witnesses later exposed this fraud on the court, perpetrated by the Arizona Attorney General, Prosecutors Office, and Arizona Courts, as set forth in their affidavits herein; [Appendix pp. 455 through Appendix pp.505]

Petitioner remains incarcerated at the Arizona [ADOC-Douglass] State prison since 1992 for the underlying convictions, currently serving a fifty-two and one-half year sentence with an estimated release date approximately of 2040.

INTRODUCTION

Whether the trial is federal or state, the concern of due process is with the fair administration of justice. At times a Judge has not been the image of "the impersonal authority of law"

but has become so personally embroiled" as to make the Judge unfit to sit in Judgment." *Mayberry v Pennsylvania*, 400 U.S. 455 (1971) (internal citation, text omitted) though *Mayberry* is not on point it is instructive for the facts of this case show petitioner has been blackballed by the courts as he has pushed to hold Judges and public officials be held accountable; see www.corruptarizonacourts.com Petitioner requests this Court grant, vacate, and remand this matter. [Appendix pp. 583]

A. POST CARD DENIALS BY THE NINTH CIRCUIT AND ITS REFUSAL TO REVIEW APPELLATE

Both, when Petitioner is represented by counsel or in Pro Per, the Ninth Circuit Court of Appeals has continually affirmed the District Court without reviewing the record and has denied petitioner access to the EN BANC court.

The Ninth Circuit rendered its decision on November 3rd, 2006 [Appendix pp. 5]. It did not review the record nor did it correctly apply the precedents dictated by this Court as well as the Ninth Circuit [Appendix pp. 342 through Appendix pp. 380]. The Court refused to allow Counsel, who is a sole practitioner, the opportunity to review the extensive record, and file the petition for rehearing and suggestion for hearing EN BANC [Appendix pp. 364 through Appendix pp. 378], when the Court denied the first request to abate time [Appendix pp. 1, Appendix pp. 3]. When these issues were brought to the attention of the panel by way of a motion to recall the mandate [Appendix pp. 342], the panel

denied the motion and refused to allow the EN BANC court to consider the motion to recall the mandate [Appendix pp. 1].

This, however, is not the first such incident. Another panel on February 24, 2004 without reviewing the record, reviewing someone else's record, denied the Pro Per request for a certificate of appealability [Appendix pp. 547] and barred petitioner from seeking EN BANC consideration. The District Court had the record. Petitioner submitted a request pursuant to the All Writs Act for EN BANC review to correct the panel error but the court refused to file it [Appendix pp. 385] and the court refused to allow the EN BANC court to consider it [Appendix pp. 396, 398].

As set forth by Counsel in the motion to recall [Appendix pp. 342] and the application for a certificate of appealability [Appendix 547 590, 591, 592] the panel decision [Appendix pp. 396, 420] is contrary to the precedents set forth by this Court. [Appendix 526, to 536]

The United States Department of Justice in Maryland had the record in Maryland. Another Ninth Circuit panel on March 30, 2005 without reviewing that record affirmed the decision and barred EN BANC review [Appendix pp. 579].

The District Court in Arizona had the record in another matter. Without that record the Ninth Circuit on February 28, 2006 affirmed the District Court and barred EN BANC review [Appendix pp. 591].

On June 12, 2007 a panel denied a Mandamus petition filed by counsel for the petitioner. [Appendix pp. 627] Had the panel reviewed the record it would

have found Counsel filed the petition [Appendix pp. 627 to 637]. All these are form denials-post card orders.

B. PETITIONER'S CIVIL CASE

Respondents executed a search warrant in California and seized certain items of property [Appendix pp. 169]. Missing from the inventory of items seized is the software [Appendix pp. 176] which is the subject of this case.

The missing items; the software, etc; were not listed as being seized.

Petitioner filed a diversity action in the United States District Court For The Central District of California. Defendants filed a Motion to Dismiss which was denied and the matter was transferred to Arizona [Appendix pp. 36]. Various stipulations as to discovery were adopted by the court but defendants did not comply [Appendix pp. 36, Appendix pp. 38]. The Trial Court denied motions to dismiss, for judgment on the pleadings, for summary judgment, and held petitioner Heck barred [Appendix pp. 40, 52, 62, 70, 74]. Petitioner was ordered to file the Fifth Amended Complaint [Appendix pp. 86, Appendix pp. 149].

After a status conference [Appendix pp. 134, Appendix pp. 140] the matter was set for trial. A final pretrial conference was held and the court granted directed verdict for the respondents [Appendix pp. 15].

Petitioner moved for change of the judge for cause and otherwise which was denied [Appendix pp. 10, to Appendix pp. 140].

The Trial Court did not consider the joint pretrial order [Appendix pp. 184], it did not allow petitioner to make a record [Appendix pp. 316], nor did it consider the misconduct by respondents as well as motions inliminie it ordered the parties to file [Appendix pp. 184].

On appeal petitioner argued that the court had no authority to grant relief by way of Rule 50 as no jury was impaneled.

Petitioner stated on appeal that as the missing property was not listed in the inventory, the claims cannot be Heck barred. It should be noted that at no time during Petitioner's criminal case did the State have to prove anything remotely related to the property missing.

As petitioner relied on admissions made pursuant to Rule 801(D)(2), Federal Rules Of Evidence and as respondents relied "exclusively on arguments of counsel", petitioner argued there was sufficient evidence to show the amount in controversy [Appendix pp. 364].

Finally, petitioner stated that the Trial Court should not have made credibility determinations and in addition to acting as counsel for the respondents, it should not have decided on the truth of his allegations to disqualify for cause [Appendix pp. 364 to 377]. The Ninth Circuit Court of Appeals reviewed what defendants had asserted and affirmed the Trial Court [Appendix pp. 5, 10]. It refused to afford petitioner the opportunity to seek rehearing and declined to Recall the Mandate [Appendix pp. 1, Appendix pp. 342, Appendix pp. 364].

C. PETITIONERS HABEAS APPEAL

Since his arrest, petitioner has argued the prosecution manufactured the crimes. Petitioner is serving a 52.5 year prison sentence for fraud with no possibility of release in any manner prior to serving 52.5 years. He sought habeas corpus relief [Appendix pp. 447]. The Magistrate Judge suggested the petition be denied [Appendix pp. 432] which was adopted by the District Court [Appendix 28, 30]. A motion to reconsider [Appendix 70, 74] was also denied [Appendix pp. 422]. On January 28th 2004, the District Court denied the request for a certificate of appealability [Appendix pp. 547].

The Ninth Circuit Court of Appeals relying on some December 3rd, 2003 document denied petitioner's certificate of appealibility and forbade EN BANC review [Appendix pp. 364]. However, there is no December 3rd, 2003 application and the Ninth Circuit could only consider applications after the January 28th, 2004 decision [Appendix pp. 398] which was served on February 3rd, 2004 [Appendix pp. 364, 531, 547].

Subsequently, petitioner filed a Writ of Certiorari [*Tripati v. Schriro*] and this Court on May 17, 2004, under the mistaken belief that it was a civil action, ordered the petition not be filed and declared the petitioner abusive of the system [Appendix pp. 625].

As this Court did not give petitioner any time limits to file the petition, petitioner's supporters have now been able to pay for Counsel. Hence, the Certiorari is timely as to the habeas also.

There is substantial evidence Arizona authorities manufactured crimes with the active participation of three Arizona judges [Appendix pp. 459, 461, 464, 465, 475, 477, 479, 483, 492, 497, 499, 515, 517, 519, 521, 524, 526, 530]. Arizona courts, including those judges whose names are involved in destroying and manufacturing evidence [Appendix pp. 485, 492, 497, 517, 524. Without any hearings and exclusively on ex parte discussions the Arizona court made findings and decided the issues against petitioner [Appendix pp. 501, Appendix pp. 503]. Factually and if justice had been served, legally petitioner is innocent of all allegations made against him [Appendix 531, Appendix pp. 547].

As the Ninth Circuit did not actually review the record, a Motion to Recall the Mandate and Mandamus was filed by the Counsel [Appendix pp. 627 to 637, 380, 385 to 398] but the Court refused to consider these [Appendix pp. 396, 397, 398].

The documents captioned in italics below are from three separate sources and clearly show that the crimes against the petitioner were manufactured by the State of Arizona and that the Arizona Courts refused to give any hearing on the merit.

i. **Frank Cotter, a Real Estate Appraiser sent a letter stating his explanation as to why he could not provide testimony in his letter dated July 22, 1993, addressed to counsel for Mr. Tripati at the criminal trial, which provided as follows:** *[Appendix pp. 464]*

Dear Ms. Vida Zoe Flores:

"I informed Mr. Conrad and Chatfield that Mr. Tripati did not ask me to arrive at the $5,000,000 value and that Mr. Tripati did not know the real estate in Riverside County was not worth $5,000,000. I also informed them that I made a mistake."

"They shut off the interview tapes and repeatedly threatened me with criminal prosecution. Mr. Conrad told me that if I testified for Mr. Tripati, I will be prosecuted."

"I called Mr. Conrad back after we talked and he told me, I must not come and testify as a witness for you and once again confirmed that he will prosecute me, if I testified."

"Based on these threats by Mr. Conrad, I am unable to testify as a witness for you. I want you to know that Mr. Tripati did not know the value [of the property] was incorrect."

Sincerely,

FRANK COTTER, Senior Certified Professional Appraiser

[Appendix pp. 464]

ii. **Additionally, Robert Fred Girdley, an alleged victim sent a letter dated April 6, 1995, to the Arizona Attorney General, which stated as follows:** *[Appendix pp. 459]*

Dear Attorney General:

"I received $4,000,000 from John Naughton to post four bail bonds and informed Mr. Gunn McKay, Dean Chatfield, Teresa Archuleta and Donald Conrad of the Maricopa County Attorney as to this fact. They informed me that if I did not blame Mr. Anant Kumar Tripati of Legal Research Associates as the person who hired me and asked me to post the four bail bonds, I shall be charged with crimes in Arizona."

"Once I was granted absolute immunity from prosecution and told Helen Maureen Jones shall not be prosecuted, I did what I was asked to do and blamed Mr. Tripati."

"Even though the documents were given to me by Mr. John Naughten I blamed Mr. Tripati as requested by Mr. Conrad and Chatfield."

"I am informing you that Mr. Tripati did not ask me to post any bail bonds and any assertions by the state to the contrary are false. Had I not been threatened and given immunity I would not have blamed Mr. Tripati. I did this to save having to pay the county money for the bonds and to escape criminal prosecution."

Very Truly,

S/D_____ROBERT FRED GIRDLEY

[Appendix pp. 459]

iii. **Finally, Helen Maureen Jones, a second victim gave an affidavit under penalty of perjury, on September 10, 1996, stating in her declaration as follows:** *[Appendix pp. 461]*

1. *Robert Fred Girdley contacted me via telephone and advised me that he was the Managing General Agent of an entity called Financial Security Assurance Co., Inc [FSAI]. He asked me to participate with him in the bail bond business under the name Bondco. He told me Bondco did not have to be licensed by the Arizona Department of Insurance. We proceeded to post bonds using the name Bondco.*

2. *Mr. Robert Fred Girdley provided me with the necessary bonding documents as well as the qualifying power of attorney forms, which I used to post bail bonds with.*

3. *Mr. Tripati never asked me to post any bail bonds.*

4. *Before testifying for the State of Arizona, I had numerous conversations with Donald*

E. Conrad and informed him of the above. I was advised by Mr. Conrad that my cooperation with the State of Arizona was necessary in the prosecution of Mr. Tripati. I was never required to pay the $140,000. I was not charged by the State of Arizona, nor was any official action by the State taken against me that affected me personally or my bail bond license.

S/D_____HELEN MAUREEN JONES;

NOTARY PUBLIC ULAH WITHERSPOON signed and dated

[Appendix pp. 461]

All three of these affidavits Appendix pp. 459, 461, 464], in addition to the testimony of the deceased Teresa Archuleta [employee at District Attorney's Office in Maricopa County] [Appendix pp. 468], under penalty of perjury, from these material witnesses used by the state of Arizona to prosecute Petitioner, demonstrate the corruption of the Arizona Courts, the unlawful conviction of the Petitioner by way of coerced immunized testimony, destruction of extrinsic evidence favorable to the Petitioner, and the criminal conspiracy of the State of Arizona and Maricopa County courts to deprive Petitioner of his constitutional liberties and substantial rights in having a fair hearing.

D. NINTH CIRCUIT'S SYSTEMIC REFUSAL TO REVIEW RECORD

On March 30th, 2005 the Ninth Circuit found that a petition for review [which was yet to be filed] was devoid of merit [Appendix pp. 590]. What is amazing is that the record was in Maryland and there is no way that the panel could have known what the record contained. No facsimile copy or otherwise was introduced into the case.

The Ninth Circuit Court found another appeal devoid of merit [Appendix pp. 591]. Just like all prior decisions, the Ninth Circuit Court did not have the District Court's record in their possession when deciding the case.

On October 9th 1997, the Arizona Court of Appeals issued its mandate [Appendix pp. 600 to 607]. A notice of post conviction relief was filed within 30 days. It was not "summarily dismissed" but decided on the merits on February 25th, 1999 [Appendix pp. 596; order of February 25th, 1999].

The District Court in error found that the petition was summarily denied by Arizona Courts [Appendix pp. 600] order by Judge Robert Broomfield and hence found the Habeas time-barred.

Apparently, without reviewing the record, the Ninth Circuit denied a certificate of appealability [Appendix pp. 592].

II.
ARGUMENT

The Evidence herein affirmatively demonstrates that the Arizona Courts have continually denied the Petitioner the right to Due process and the constitutional liberties afforded in the United States Constitution. Arizona Courts coerced immunized witnesses to pro-offer false testimony, destroy material evidence in favor of the petitioner, and manufacture evidence to support its position to unlawfully and unconstitutionally convict Petitioner of Fraud related causes of action, sentencing him to more than 50 years in an Arizona prison. This unlawful and corrupt practice in the Arizona Courts of Maricopa County must immediately be enjoined and this court must order a hearing on this matter, given (1) the Ninth Circuit's substantial departure from judicial practice by its failure to review the record, (2) the Arizona Court's decision to make factual findings on a Rule 50 motion without affording the Petition his constitutional right to a jury, (3) the property at issue, supplanted by Arizona authorities and used to obtain a conviction of petitioner, was not listed on the state's return to search warrant, (4) the Arizona court's failure to recognize that admissions made pursuant to F.R.C.P. 801(d)(2) are substantive evidence, (5) the Arizona Court's failure to allow Petitioner to present material evidence in support of his affirmative defenses, and (6) the Ninth Circuit's failure to review the instant record before denying the Petitioner's certificate of appealibility which as abridged Petitioner's right to Federal Habeas.

A. THE NINTH CIRCUIT'S PROCEDURE OF NOT REVIEWING RECORD AND AFFIRMING DECISIONS CONSTITUTES SUBSTANTIAL DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEDURES MANDATING THIS COURT EXERCISE IT'S SUPERVISORY POWERS.

The Supervisory Power of this Court has been discussed at length by Professor Sara Sun Beale. In Sara Sun Beale, **Reconsidering Supervisory Power in Criminal Cases; Constitutional and Statutory Limits on the Authority of the Federal Court** 84 Colum. L.Rev. 1433 (1984), Professor Beale identifies Article III as the source of this Court's Supervisory Power.

Nguyen vs. United States, 539 U.S. 69, 81(2003) states "the authority which Congress has granted this Court to review judgments of the Court Of Appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding cases before them." [Internal quotation omitted].

In *Dickerson v. United States*, 530 U.S. 428, 437 (2000), this Court confirmed its authority over federal court procedure including its authority outside the federal rulemaking process. Such clear authority is well entrenched. Since this court first claimed this authority in *McNabb v. United States*, 318 U.S. 332, 340 (1943), it has used its Supervisory

Powers through adjudication to set forth a vast array of procedures binding Federal Courts.

McNabb, supra, is credited widely as being the first case in which this court exercised its Supervisory Powers. See **Sara Sun Beale, Reconsidering Supervisory Power In Criminal Cases; Constitutional And Statutory Limits On Authority Of The Federal Courts**, 84 Colum. L. Rev 1433 (1984) at 1435. Two weeks prior to *McNabb*, this Court utilized its Supervisory Powers to prohibit comments on a defendant's refusal to testify in *Johnson v. United States*, 318 U.S. 189, 199 (1943); also *Weeks v. United States*, 232 U.S. 383, 398 (1914) was grounded on the Fourth Amendment. However, some of the Justices in *Mapp v. Ohio*, 367 U.S. 643, 678 (1962) stated that *Weeks* involved the exercise of the Supervisory Power. On the same day as McNabb was decided, this Court applied the McNabb Rule to exclude confessions in *Anderson v. United States*, 318 U.S. 350, 355-56 (1943).

McNabb is the first self-conscious exercise by this Court of its supervisory authority in context of adjudicating a case. This Court in deciding *McNabb* did not rely on any statutory or Constitutional authority but on an evidentiary policy of its own making, 318 U.S. at 346-47.

In *Thiel v. Southern Pacific Co*, 328 U.S. 217 (1946), this Court invoking the power it claimed in McNabb-"power of supervision over the administration of Justice in the Federal Courts" Id. at 225 held "systematic and intentional exclusion" of daily wage earners from jury duty was forbidden. Id at 220.

Castro v. United States, 540 U.S. 375 (2003), involved a prisoner styled motion "Rule 33 motion for a new trial." Without notice to the prisoner, the District Court called the motion a 2255 petition. This subjected any subsequent motion under 2255 to the restrictive conditions that Federal law imposes upon a "second or successive" (but not upon a first) Federal habeas motion. Id at 379. Invoking its supervisory power, this court held though not mandated by the Constitution, a District Court must notify a prisoner about its recharacterization and consequences before converting a motion to one pursuant to 2255. Id at 382-83.

The appointment of prosecutors with interest in a contempt finding was forbidden by this court through the exercise of its supervisory powers. See *Young v. United States Ex-Rel Vuitton ET AL;* 481 U.S. 787, 808-09 (1987).

Pursuant to its Supervisory Power, this Court held in *Rosales-Lopez v. United States,* 451 U.S. 182, 190-92 (1981) that Courts must inquire into racial prejudices of jurors. *McCarthy v. United States,* 394 U.S. 459, 463-64 (1969) involved this court using its Supervisory Powers to require a defendant plead anew if Rule 11 was not followed.

All these Supervisory Power cases set forth procedures not mandated by the Constitution or Congress. Occasionally the rules announced by this Court pursuant to its Supervisory Powers have been given Constitutional status by this Court. This Court, in *Ballard v. United States*, 329 U.S. 187, 193, 195 (1946) used its Supervisory Powers to bar "purposeful and systematic exclusion of women" from grand and petit juries. In *Taylor v. Louisiana,*

419 U.S. 522, 525-26 (1975), this Court found exclusion of women from jury duty violated their Sixth Amendment rights.

Ortega-Rodriguez v. United States, 507 U.S. 234, 244-52 (1993) held unreasonable the practice of the Eleventh Circuit to dismiss appeals by fugitives.

United States v. Payner, 447 U.S. 727, 736-37 (1980) invalidated a local practice.

"Judicial supervision of the administration of justice in the Federal Courts implies the duty of establishing and maintaining civilized standards of procedures and evidence" *McNabb v. United States,* 318 U.S. 332 (1943). In *McNabb*, this Court invoked its Supervisory Power because the "petition for certiorari presented serious questions in the administration of federal criminal justice." Id at 333. The *McNabb* petitioners were subjected to procedures by officers assuming functions not authorized by Congress.

The actions taken by the Ninth Circuit Court as shown by this petitioner demonstrates the Ninth Circuit has failed to provide the "learning, good sense, fairness and courage" standard, Id at 616, which this court considers essential for the fair administration of justice.

This court found in *Grunewald v. United States*, 353 U.S. 391, 423, (1957) that the discretionary evidentiary ruling raised "grave constitutional overtones..." The ruling at issue was the probative value of a defendant's invocation of his privilege of self incrimination before the grand jury.

In *Marshall v. United States*, 360 U.S. 310, (1959), the Court exercised its Supervisory Power to reverse a conviction. Some Jurors had read articles

about excluded evidence and after interviewing the Jurors, the trial judge found no prejudice. This Court felt constrained to intervene to "apply proper standards" Id. at 313.

The Court reversed the admission of defendant's silence to impeach pursuant to its Supervisory Power in *United States v. Hale*, 422 U.S. 171, (1975).

All these cases have a common thread which is, judicial action interfering with proper standards of justice in Federal Courts.

They are not subject to harmless error analysis as they involve "structural defects in the constitution of the Appellate mechanism, which defies analysis by harmless-error standards"; emphasis added *Arizona v. Fulminante*, 499 U.S. 279, 309, (1991). The failure of any Court to perform the acts required of the Court goes to the essence of the justice system. It is the Appellate Judge who must sit as an arbiter, determine after review of the record, briefs, law and argument what action to take. This cannot be done without reviewing the record.

As such, the failure of the Appellate Judges to review the record and take action as is currently being done by the Ninth Circuit Court is a "structural defect" in the Appellate process. It impugns the integrity of the Federal Judicial Branch.

B. THE DECISION THAT A RULE 50 MOTION CAN BE GRANTED BY A JUDGE WITHOUT A JURY IS STRUCTURAL ERROR.

Rule 50(a)(1) provides in part "if during a trial by Jury....." Clearly, Rule 50(a) contemplates a jury trial has begun. Once a jury trial has begun, defendants may seek dismissal by way of Rule 50. The rule does not contemplate a Judge trial.

Defendants in this case utilized the procedures for pre-trial dismissal by way of Rule 12(b)(6) Federal Rules of Civil Procedure, motion for judgment on the pleadings by Rule 12(c), summary judgment by Rule 56 and a series of Heck dismissals. They did not prevail [Appendix pp. 32 to Appendix pp. 132].

The Advisory Committee Notes to the 1991 amendment states that Rule 50 motions must be made "prior to the close of the trial." In *Anderson v. Liberty Lobby, Inc*; 477 U.S. 242, 250, (1986), this Court stated in a JMOL the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." The trial court applies the same standard as for summary judgment *Reeves v. Sanderson Plumbing Products, Inc*; 530 U.S. 133, 150, (2000).

In this matter, petitioner presented Federal Rules of evidence 801(d)(2) evidence to substantiate his claims and the respondents presented "the same arguments of prior Counsel which arguments were previously rejected by the Court" as the only

evidence. As a matter of law the motion should have been denied.

No jury was impaneled, nor had the trial begun. Furthermore, the standard for granting a Rule 50 motion is different and distinct from Rule 56 and Rule 52 motions.

As no jury was impaneled, it was a structural error on appeal for the Ninth Circuit to uphold the trial Court's decision to grant the Rule 50 motions.

Had the panel reviewed the record and applied Circuit precedent, *McSherry v. City of Long Beach, et al.*, 423 F.3D 1015 (9th. Cir 2005), *Waters v. Young, et al.*, 100 F. 3D 1437 (1996), it would have arrived at a different result.

C. WHEN THE RETURN TO THE SEARCH WARRANT SHOWS THAT THE PROPERTY AT ISSUE WAS NOT LISTED IN THE INVENTORY, HECK DID NOT BAR THOSE CLAIMS.

Heck v. Humphrey, 512 U.S. 477, (1994) at footnote 7, states that claims for unlawful search and seizures may lie if they do not undermine a conviction. In this case, the return to the search warrant does not list the missing property [Appendix pp. 169] which is the software in [Volume Two, Appendix pp. 176].

The officers stole the property. Petitioner in this diversity action sought relief under State laws for the property stolen. That property has nothing to do with the criminal convictions [Appendix pp. 184].

However, the panel (because it did not review the record) found that the criminal convictions

barred the claims. This conclusion is not contemplated by *Heck* and not supported by the record.

D. ADMISSIONS MADE PURSUANT TO RULE 801(d)(2) OF THE FEDERAL RULES OF EVIDENCE ARE SUBSTANTIVE EVIDENCE.

"A statement once made, is no less a statement simply because it's maker has changed his or her mind", *South Central Bank v. Citicorp Credit Services*; 863 F. Supp 635, 646 (N.D. ILL. 1994) and this is true even if the statements were not intended for third parties. Id. These statements are not subject to cross-examination, *Auto-Owners Inc Co. v. Jensen,* 667 F. 2D 714, 722 (8th Cir 1981). As long as the statement is contrary to the position taken by defendants, they are admissible, *United States v. Matlock,* 416 U.S. 164, 172 (1974), even if the person who made the statements is dead *Savarese v. Agniss,* 883 F. 2D 1194, 1200 F.N. 9 (3rd. Cir 1989). There is no need for the person to whom the statement was made to have first hand knowledge of the statements, *Mahlandt v. Wild Canid Survival & Research Ctr,* 588 F. 2D 626, 630 (8th. Cir.(1978). "Even if a District Court believes the evidence is insufficient to prove the ultimate point for which it is offered, it may not exclude the evidence if it has the slightest probative value", *Douglass v. Eaton Corp*; 956 F. 2d 1339, 1344 (9th Cir. 1994).

Petitioner had presented evidence in the form of Federal Rules of Evidence 801(d)(2) statements made by defendant Teresa Archuleta [deceased] and

documentary evidence substantiating his claims. Based on exactly this same evidence, the Court had denied both the motion for summary judgment and the motion to reconsider that denial. Using the same arguments, the Court denied the motions to dismiss and judgment on the pleadings [Appendix pp. 40, 52].

Prior to the final pre-trial conference, the same District Judge found the evidence warranted the matter be submitted to a Jury [Appendix pp. 36 to Appendix pp. 70].

What happened to get the judge to take a 180 degree turn is not known?

As the panel did not review the record but relied on what Counsel said, it erred in finding that the Federal Rules of Evidence 801(d)(2) admissions offered by the plaintiff, was insufficient evidence. Substantive evidence exists, and had the panel reviewed the record, it would have found otherwise [Appendix pp. 184, Appendix pp. 316].

E. CONSIDERATION OF DEFENSES IN DETERMINING THE VALUE OF PROPERTY IS CONTRARY TO ST. PAUL.

In *St. Paul Mercury Indem. Co. v. Red Cab Co;* 303 U.S. 283, 295-296 (1938), this Court held that the amount in controversy in a diversity action is not affected by the defenses raised by a party.

By failing to review the record, the Ninth Circuit upheld the Trial Court's consideration of these defenses. Had the panel reviewed the record, it

would have found otherwise [Appendix pp. 184, Appendix pp. 366].
Petitioner gave his affidavit swearing that the value of the software stolen by defendants [Appendix pp. 176] and not listed on the inventory [Appendix pp. 169] exceeded $100,000 [Appendix pp. 184].

F. THE NINTH CIRCUIT BY NOT REVIEWING THE RECORD BEFORE DENYING THE CERTIFICATE OF APPEALABILITY HAS ABRIDGED THE RIGHT TO FEDERAL HABEAS

The petitioner must demonstrate that reasonable jurists would find the District Court's assessment of the claims debatable or wrong *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), to obtain a certificate of appealability. As stated in *Slack*, the petitioner needs to show an encouragement to proceed further.

According to the evidence, petitioner showed that Arizona Judges asked and had evidence favorable to petitioner destroyed. These same judges without any hearings resolved the issues though they had a vested interest [Appendix pp. 465 to 497]. *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) found when there is "some basis for rendering a biased judgment, [with] actual motivations-hidden from review", that decision is void. The *Vasquez* court vacated a conviction for racial discrimination in the Grand jury Process. "When Constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court

can neither indulge a presumption of regularity nor evaluate the resulting harm."

In the face of the evidence of corruption of the truth seeking process by the Arizona judges, *Bracy v. Gramley*, 520 U.S. 899 (1997) requires that petitioner be allowed to conduct discovery. In *Bracy*, this court found sufficient evidence as to bribes that warranted discovery.

This petitioner through documentary evidence had shown that Arizona judges had a vested interest in this matter and those judges with a vested interest, to protect their own interest, entered orders making findings which can only be made after hearings. By way of example, these judges without holding hearings, found that evidence incriminating both the judges and the prosecutors were forged [Appendix pp. 380]. Such findings can not be made without a hearing. **Both the Arizona Appellate and Supreme Court issued postcard denials [Appendix pp. 378].**

Additionally, *Brady* requires discovery on this issue. The Ninth Circuit by not reviewing the record denied leave to appeal. Pursuant to *Vasquez*, the process was impaired and the Federal Courts "can neither indulge a presumption of regularity nor evaluate the resulting harm."

The affidavits, letters, and documents created by agents of the State of Arizona all do show that, the petitioner was convicted of crimes manufactured by the prosecutor with the help of the three Arizona judges [Appendix pp. 459, 461, 464, 465 to 476]. All these materials were concealed by the State of Arizona [Appendix pp. 459 to 639].

In *Bousley v. United States*, 523 U.S. 614 (1998), this Court stated actual innocence is not legal innocence, but factual innocence. The petitioner in Bousley contested the validity of his guilty plea. This Court held if Bousley shows he was factually innocent, he may have his claims reviewed.

The evidence shows petitioner is "factually innocent" *Herrera v. Collins*, 506 U.S. 390 (1993). This evidence is supported by credible evidence created by the State of Arizona and documents from the victims. In *Herrera* ten years after his conviction, *Herrera* presented arguments with affidavits showing he was innocent. This Court found the evidence showed *Herrera* was not innocent in any sense of the word, *Dretke v. Haley*, 541 U.S. 368 (2004).

Conversely, petitioner, from affidavits by victims and State-created documents has shown he is factually innocent.

Strickler v. Greene, 527 U.S. 2633 (1999) states "the suppression by the prosecution of evidence favorable to the accused ... violates due process where the evidence is material to guilt or to punishment." In *Strickler*, this Court found that petitioner was unable to show prejudice from the failure to disclose the Stoltzfus documents for the documents would not have undermined her testimony. Unlike *Strickler*, the documents in this case show that the prosecutor along with the three judges manufactured the crimes and had the evidence destroyed. This evidence undermined the Jury verdict and resulted in a prison sentence of more than fifty-two years on petitioner.

This Court stated in *Mooney v. Holohan*, 294 U.S. 103 (1935), that convictions obtained by the knowing use of perjured testimony violates due process. According to the *Mooney* Court, petitioner had not sustained his burden and so it denied leave to file the habeas. *Pyle v. Kansas*, 317 U.S. 213 (1942) remanded the petition for further proceedings to afford Pyle the chance to show his conviction was the product of false evidence.

The Texas prosecutor in *Alcorta v. Texas*, 355 U.S. 28 (1957) through a witness, Castilleja, presented false testimony that did not disclose the affair Castilleja had with Alcorta's wife. This Court remanded the matter finding a due process violation.

Likewise, the prosecution's witness Hamer, in *Napue v. Illinois*, 366 U.S. 264 (1959) lied when he testified he had no immunity. This Court remanded finding a due process violation. The documents, affidavits, and letters in this case [Appendix pp. 459 to 639] do all satisfy the *Strickler-Mooney-Pyle-Alcorta-Napue* standards. Petitioner should have been given a hearing.

These Brady materials were destroyed because of the animus between the parties. Due to this animus, petitioner was entitled to an evidentiary hearing as the *Arizona v. Youngblood*, 488 U.S. 51 (1988) bad faith requirements did not apply in such cases where the evidence is Brady material which is destroyed due to an animus.

If the Appellate panel of the Ninth Circuit would have reviewed the record and followed the law as decided by this Court, [Appendix pp. 531, pp. 547] it would have found that the decision of the Arizona Courts was contrary to, or involved an unreasonable

application of, clearly established Federal law as determined by this Court. The panel would have found Arizona Court's actions constituted an unreasonable determination of facts in light of the evidence presented in the State Court proceedings *Williams v. Taylor*, 529 U.S. 362 (2000).

This miscarriage of justice must immediately be reviewed and a certificate of appealability must be issued, pursuant to *Miller-EL v. Cockrell*, 537 U.S. 322 (2003)

G. THE REPEATED REFUSAL BY THE NINTH CIRCUIT TO ALLOW THE FILING OF EN BANC PETITIONS AND MOTIONS TO RECALL MANDATES OUTLINING EGREGIOUS DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS A TOOL TO REDUCE ITS WORKLOAD MANDATES EXERCISE OF THE SUPERVISORY POWER.

"Maintaining civilized standards of procedure" *McNabb v. United States*, 318 U.S. 332 (1943) mandates this Court exercise its Supervisory Powers. The procedures utilized by the Ninth Circuit in this petition constitutes an egregious departure from the usual course of judicial proceedings thereby raising grave constitutional overtones *Grunewald v. United States*, 353 U.S. 391, 423 (1957).

Clearly, the petition for rehearing [Appendix pp. 364] motion to recall the mandate [Appendix pp. 342] should have been granted as they show the Ninth Circuit is not applying and maintaining

civilized standards of procedure and has egregiously departed from the usual course of judicial proceeding. The Ninth Circuit must review the record and apply Supreme Court precedent.

III.
CONCLUSION

Where an appellant pays the full filing fees and submits a brief in compliance with the rules that appellants appeal must be heard. *Matin v. District of Columbia Court of Appeals*, 506 U.S. 1 (1992). Under the facts of this case, the Ninth Circuit has denied petitioner meaningful Appellate review. Arizona Judges have covered up for each other as petitioner has argued for judicial reform. The egregious constitutional rights and civil rights violations demonstrated in this petition mandate the court exercise its supervisory power and direct the Ninth Circuit to meaningfully review the record and follow precedents. When appellate courts act as the Ninth Circuit herein, it destroys the integrity of the judiciary. The interest of justice mandates the immediate review of this appeal after full briefing. This court must exercise its supervisory power and direct the Ninth Circuit to meaningfully review the record and follow precedents therein.

Respectfully submitted,

December 11, 2007

S/D **ANANT KUMAR TRIPATI**
Petitioner, in Pro Per